

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

J&S DELIVERY, INC.
Employer

and

Case 5-RC-15781

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS AFL-CIO, LOCAL UNION 992
Petitioner

ADMINISTRATIVE LAW JUDGE'S REPORT AND
RECOMMENDATIONS ON OBJECTIONS

JOHN T. CLARK, Administrative Law Judge. Upon a petition filed on September 24, 2004,¹ by International Brotherhood of Teamsters AFL-CIO, Local Union 992 (the Petitioner or the Union), and pursuant to a Stipulated Election Agreement executed by the Petitioner and J&S Delivery, Inc., (the Employer), and approved by the Regional Director for Region 5 on October 5, an election by secret ballot was conducted on October 28 in the following unit of employees:

All full-time and regular part-time drivers and night sorters employed by the Employer at the DHL Express, Inc. facility located in Frederick, Maryland, but excluding all dispatchers, managers, professional employees, guards and supervisors as defined in the Act.

The tally of ballots shows that of approximately 23 eligible voters, 18 employees cast ballots, 10 for the Petitioner, and 7 against, with 1 challenged ballot, an insufficient number to affect the results of the election.

On November 3, the Employer filed timely objections to conduct affecting the results of the election, alleging that before the election two employees were offered \$50 for a "yes vote" in favor of the Union, thereby destroying the integrity of the voting process and interfering with the free choice of the employees.

In light of the material and substantial factual issues raised by the Objections the Regional Director for Region 5, on November 8, issued a Report on Objections and Notice of Hearing, ordering that a hearing be held on November 19, before a duly designated administrative law judge concerning the issues raised by the Employer's objections. The parties were represented by counsel at the hearing and were afforded full opportunity to participate, be heard, present evidence, examine witnesses, make oral argument, and submit briefs.²

¹ All dates are in 2004.

² The date for receipt of briefs was set for close of business on November 29. The Employer's representative stated that she would file a brief. When none was forthcoming a query of the representative resulted in a brief being faxed on December 7. The brief contained no information regarding when it was mailed and no evidence of service. Notwithstanding two telephonic requests, no evidence of timely service was provided. Accordingly, the Employer's brief is rejected as untimely.

In accordance with the Regional Director's Order, and on the entire record of the case, including my observations of the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, and after
5 considering the arguments by the parties, I make the following findings of fact and credibility resolutions and issue this report with recommendations to the Board.

The Objections

10 In support of its objections the Employer presented employee Jorge Juarez as a witnesses. Juarez stated that he was a part-time employee who had been employed by the Employer for about five years. Juarez stated that he worked a full-time job from 6:30 a.m. to 3:30 p.m. and then drove to the Employer's facility where he worked part-time from 5 to 9 p.m. Juarez stated that he had signed a Union authorization card in August and that he was a Union
15 supporter. Juarez testified that while working for the Employer he was approached by fellow employee Teddy Williams. According to Juarez, Williams asked him if he was going to vote for the Union. Juarez avoided a direct response and said that if the election was held in the morning he would not be able to vote because he had to be at his full-time job. Juarez said that Williams replied that he (Williams) and another employee, talked about Juarez and Jose, also a
20 part-time employee who worked at night, and that they would pay Juarez and Jose \$50 each if they would show up and vote yes. Juarez said that he ended the conversation by saying he didn't know "if I'm going to be here or not." Although Juarez did not remember exactly when this conversation occurred he did say that it happened sometime after he signed the authorization card and before the election. Juarez further stated that he told Jose of the conversation and
25 that Williams asked him if he was going to show up and vote for the Union on one other occasion, although Juarez did not specify where or when that conversation occurred.

The election was held in the morning and the evening. Juarez admitted voting and that he never received \$50 from Williams. He said that he did not ask for the money because "I was
30 not going to take any \$50. That's not even going to cover me anything, I mean that \$50."

Teddy L. Williams, Jr. testified that he was a Union supporter and that he had attended three Union meetings during the months of August and September. He also testified that although he sought opinions of other employees about the Union, he was unaware of how many
35 votes the Union needed to win the election. Williams testified that he spoke about the Union with Juarez on two occasions, probably in late August or possibly the very beginning of September. He said that he told Juarez that it was very important that every eligible voter, vote. Williams denied asking Juarez how he would vote because it was his understanding that Juarez was a Union supporter. Williams said that Felix Maldonado, the employee who asked Juarez to
40 sign the authorization card, said that Juarez was happy to sign the card. Williams stated that at the time he spoke to Juarez he thought that the election was only going to be held in the morning and thus Juarez would have a problem getting to the polling place because of his full-time job. Based on this understanding Williams testified that he offered Juarez \$50 as compensation for the money he would lose by being late for his other job. Williams denied
45 making the offer to anyone else, or telling anyone else about the offer. Williams also denied telling Juarez to talk to Jose. Williams testified that any discussion he had with coworkers was of his own accord and that he did not offer to help any Union officials. He denied being a Union official, or an employee or member of the Union. He testified that he was not paid by the Union,

nor was he on any Union organizing committee. Williams stated that he never gave Juarez \$50, and that Juarez never asked for the \$50.

The Petitioner called Tom Krause the Principal Executive Officer/Secretary-Treasurer of Teamsters' Local Union 992. He testified that Williams was not an agent of the Union, was not authorized to act on behalf of the Union, and was not a Union observer at the election. He stated that he was unaware of the \$50 issue until the objections were filed. The Petitioner also called Owen Neely as a witness. Neely testified that he was employed by Teamsters Joint Council 62, in Baltimore, Maryland, and that he was involved in organizing the Employer. He stated that there was no organizing committee among the employees and that he also was unaware of the \$50 issue until the objections were filed. He also corroborated Williams' testimony that Williams did not offer to help with the organizing.

Credibility

I find Williams to be a credible witness and I fully credit his testimony of the events. In addition to his demeanor he appeared to have a better recall of the events than Juarez. For instance, Juarez initially stated that Williams approached him about voting sometime during the summer. On cross examination he admitted that he was not certain when the conversation happened. On redirect he stated that the conversation occurred at a point in time between when he signed his Union authorization card, which he believes was in August, and the election on October 28. Juarez also had the demeanor of an uncomfortable witness who appeared to be extremely reluctant to admit having been a union supporter. Neither Felix Maldonado nor the employee known only as Jose was called to testify.

Discussion

It is well settled that "[r]epresentation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) [citing *NLRB v. Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)]. "There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Furniture Mfg. Co.*, supra, 941 F.2d at 328. Accordingly, "the burden of proof on parties seeking to have a Board supervised election set aside is a 'heavy one.'" *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) [quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir.), cert. denied 416 U.S. 986 (1974)].

Williams credibly testified that he spoke twice with Juarez about the Union and "that was probably in late August, maybe like the very beginning of September possibly." The petition was filed September 24. The Regional Director, in footnote 3 of his Report on Objections and Notice of Hearing, cites *Goodyear Tire & Rubber Company*, 138 NLRB 453 (1962) for the proposition that he will "consider on its merits only that alleged interference which occurred during the critical period which begins on and includes the date of the filing of the petition and extends through the election." Thus, based on Williams' credited testimony the alleged conduct occurred before the petition was filed and therefore cannot form the basis for setting aside an election.

Additionally, even assuming that the conduct did occurred during the critical period, the Employer has not established that Williams acted under any actual or apparent authority of the Union. See generally *Overnite Transp. Co., v. NLRB*, 140 F.3d 259, 264-269 (D.C. Cir. 1998). Accordingly, I find that Williams was acting as a third party. The Board has traditionally been reluctant to set elections aside because of misconduct by third parties. E.g., *NLRB v. Aaron Brothers Corporation*, 563 F.2d 409, 412 (9th Cir. 1977) (per curiam). To warrant overturning

an election the employee or third party conduct must be “coercive and disruptive conduct or other action [which] is so aggravated that a free expression of choice of representation is impossible.” *Monroe Auto Equipment*, supra at 1332 (citation omitted). The Employer has not carried its burden. Contrary to the allegations contained in the objections Williams did not offer

5 Juarez money for his vote, he merely offered him recompense for money that he would lose by voting in the election and not working at his full-time job. The amount offered by Williams is not exorbitant. Indeed, Juarez testified “I was not going to take any \$50. That’s not even going to cover me anything, I mean that \$50.” See *Kux Mfg.*, supra at 810.

10 SUMMARY AND RECOMMENDATIONS

Based on the findings of fact, credibility resolution and discussion of the applicable legal principles, it is recommended that the Employer’s objections be overruled in their entirety. As the tally of ballots shows that the majority of valid votes counted have been cast for the

15 Petitioner, it is recommended that the Board issue a Certification of Representative to the Petitioner.³

Dated, Washington, D.C., December 22, 2004.

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JOHN T. CLARK
Administrative Law Judge

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³ Pursuant to the provisions of Sec. 102.69 of the Board’s Rules and Regulations, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington, D.C. an original and eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the

50 other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt the Recommended Decision.